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**IN THE
COURT OF APPEALS OF INDIANA**

PAUL W. BRADLEY,
Appellant-Respondent,

VS.

STATE OF INDIANA,

Appellee-Petitioner.

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No. 34A02-0702-CR-160

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0603-FD-249

August 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Paul Bradley (Bradley), appeals his convictions for Count I, possession of methamphetamine, a Class D felony, Ind. Code § 35-48-4-6-1(a), and Count II, driving while suspended, a Class A misdemeanor, I.C. § 9-24-19-2.

We affirm.

ISSUES

Bradley raises two issues on appeal, which we restate as follows:

- (1) Whether the State presented sufficient evidence to prove beyond a reasonable doubt Bradley's conviction of possession of methamphetamine; and
- (2) Whether the jury was properly instructed as to constructive possession in Final Instruction number 9.

FACTS AND PROCEDURAL HISTORY

On March 17, 2006, Officer Chad VanCamp (Officer VanCamp) of the Kokomo Police Department noticed a cracked windshield on the vehicle driven by Bradley. Officer VanCamp followed him and initiated a traffic stop for failure to activate his turn signal. When Officer VanCamp approached Bradley's vehicle, he explained the reason for the stop and requested his driver's license and vehicle registration. Because Bradley stated that he did not have his driver's license, Officer VanCamp requested dispatch to conduct a driver's license inquiry. While waiting for the result, Officer VanCamp, also a drug interdiction officer, ran an exterior drug dog search on Bradley's vehicle, which tested positive. Officer VanCamp then requested Bradley exit the vehicle, read him his *Miranda* rights, and arrested him. Bradley was the only passenger in the vehicle.

During an interior search of the vehicle, Officer VanCamp observed a plastic “baggie” between the two front seats, which was “partially exposed on top of the seat.” (Transcript p. 52). In this bag, he found five coffee filters along with another little plastic bag that contained a white powdery substance. After performing a field test, the substance inside the bag tested positive for methamphetamine. Later, laboratory tests confirmed the field test and found the substance weighed 0.17 grams. In addition, a blister pack containing six 80-milligram Pseudoephedrine pills, often used when making methamphetamine, was found above the driver-side visor and was confiscated. Prior to the search, Bradley told Officer VanCamp there were no drugs in the vehicle. He also told Officer VanCamp he drove this vehicle on a daily basis.

On March 21, 2006, the State filed an Information charging Bradley with two Counts: Count I, possession of methamphetamine, a Class D felony, I.C. § 35-48-4-6-1(a), and Count II, driving while suspended, a Class D felony, I.C. § 9-24-19-2. On December 18, 2006, a jury trial was held; at the conclusion of the evidence, the jury found Bradley guilty as charged. Thereafter, on January 24, 2007, the trial court sentenced Bradley on Count I, possession of methamphetamine, to the Indiana Department of Correction for a period of three years executed, and on Count II, driving while suspended, for a period of three hundred and fifty-six days. The trial court ordered Bradley serve the sentences consecutively.

Bradley now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

First, Bradley contends that the State failed to present sufficient evidence to prove beyond a reasonable doubt he possessed methamphetamine. Specifically, he argues that the evidence does not establish that he had knowledge of the presence of methamphetamine stuffed in between sections of the front seats of his vehicle.

A. Standard of Review

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028-29 (Ind. Ct. App. 2002). We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Alspach v. State*, 755 N.E.2d 209, 210 (Ind. Ct. App. 2001), *trans. denied*. The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Cox*, 774 N.E.2d at 1028-29. A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *Maul v. State*, 731 N.E.2d 438, 439 (Ind. 2000).

B. Possession of methamphetamine

Possession of methamphetamine, a Class D felony, is codified in I.C. § 35-48-4-6-1(a) which provides, in pertinent part:

A person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesses methamphetamine (pure or

adulterated) commits possession of methamphetamine, a Class D felony, except as provided in subsection (b).

Accordingly, to convict Bradley of possession of methamphetamine, the State was required to prove beyond a reasonable doubt that Bradley knowingly or intentionally had possession of the methamphetamine, pure or adulterated, found in the vehicle he was driving. Bradley's contention relates to the "knowingly" element of the charge. *See* I.C. § 35-48-4-6-1 (a).

"Indiana law recognizes two kinds of possession: actual possession and constructive possession." *Bradley v. State*, 765 N.E.2d 204, 211 (Ind. Ct. App. 2002). When a person knowingly has direct physical control over an object at a certain time then he or she has actual possession of it. *Id.* When a person does not have actual possession, but instead knowingly has the capability and intent to exercise dominion and control over the object, this person is deemed to constructively possess the object. *Id.* at 211-12. Here, because the methamphetamine was not found on Bradley, the State did not establish he had actual possession over it and had to prove constructive possession.

Evidence of constructive possession is sufficient where the State proves that the defendant had both the capability and intent to maintain dominion and control over the contraband. *Hardister v. State*, 849 N.E.2d 563, 573 (Ind. 2006). The intent element is satisfied by corroborated circumstances that indicate knowledge. *Bradley*, 765 N.E.2d at 212. The factfinder may infer the individual's intent to maintain dominion and control of the contraband from additional circumstances, which may include incriminating

statements, drugs in plain view, as well as location of the contraband in close proximity to items owned by the defendant. *Hardister*, 849 N.E.2d at 574.

Here, the State must have established Bradley's knowledge of the methamphetamine's presence in the vehicle, which can be inferred from additional circumstantial evidence. Our review of the record indicates Bradley made incriminating statements, including that he had knowledge of and information about a working methamphetamine lab in the city. He also stated that he did not want to go to jail. Also, Officer VanCamp testified that the contraband was in plain view and easy to reach, being located between the two front seats. Moreover, Bradley was alone in the car and he admitted that he drives the car on a daily basis. *See Whitney v. State*, 726 N.E.2d 823, 827 (Ind. Ct. App. 2002) (sole possession of the car in which the drugs are found is sufficient to show ability to control the drugs). Thus, based on the evidence, the jury could infer Bradley had both the intent and the capability to maintain dominion and control over the methamphetamine; therefore, he had constructive possession over the methamphetamine. As a result, we conclude the state presented sufficient evidence to prove beyond a reasonable doubt that Bradley knowingly possessed methamphetamine.

C. Jury instructions

Second, Bradley contends the trial court improperly instructed the jury as to the definition of constructive possession. In doing so, Bradley contests Jury Instruction number 9, which reads: "Constructive possession of items found in an automobile may be imputed to the driver of the vehicle." (Appellant's Appendix p. 78). Specifically, Bradley asserts this instruction invaded the province of the jury by eliminating the

possibility of the jury finding the contraband belonged to someone else. He contends that the instruction permits the jury to convict him solely because the contraband is located in the vehicle that he drives and not because the evidence proved beyond a reasonable doubt he knew of its existence.

Initially, it is well-established by this court that instructing the jury is within the sole discretion of the trial court. *White v. State*, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), *trans. denied*. A trial court's decision regarding jury instructions will be reversed on appeal only for an abuse of discretion. *Forte v. State*, 759 N.E.2d 206, 209 (Ind. 2001). Jury instructions are to be considered as a whole and in reference to each other. *Id.* An error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Id.* at 1032-33. Before a defendant is entitled to a reversal, he must affirmatively show that the instructional error prejudiced his substantial rights. *Hancock v. State*, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000).

In our review of the record, we find that Bradley's Counsel did not object to the aforementioned instruction when it was given to the jury. The failure to object to jury instructions waives any claim of instructional error on appeal. *Clay v. State*, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002). Thus, we find that Bradley waived his argument concerning instructional error when he failed to object to Jury Instruction Number 9. Waiver notwithstanding, we choose to address Bradley's claim on its merits.

Our review of the trial court's instruction does not lead us to believe that it invaded the province of the jury. Instead, we conclude the instruction is a correct statement of the law for the following reasons: (1) the instruction language is permissive,

stating that constructive possession “may be imputed,” not that it *must be imputed*; and (2) the instruction does not mandate the jury to convict Bradley solely on the basis that the methamphetamine was in the car, but by corroborating additional evidence to infer Bradley’s connection with it. *See Higgins v. State*, 783 N.E.2d 1180, 1185 (Ind. Ct. App. 2003), *trans. denied* (describing the difference between the mandatory presumption instruction and the permissive inference). Thus, we hold the trial court did not abuse its discretion by instructing the jury regarding the law of constructive possession.

CONCLUSION

Based on the foregoing, we conclude: (1) the State presented sufficient evidence to prove beyond a reasonable doubt Bradley possessed methamphetamine, and (2) the jury was properly instructed as to constructive possession.

Affirmed.

NAJAM, J., and BARNES, J., concur.